AUG 6 19
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73- 74-78

PETER PREISER, Commissioner of the Department of Correctional Services of the State of New York, and PAUL J. REGAN, Chairman of the Board of Parole of the State of New York (as successor, in the imposition of restraint upon the liberty of Petitioner, of

(1) H. W. FOLLETTE, Warden, Green Haven Prison, Stormville, New York,

(2) JOHN L. ZELKER, Superintendent, Green Haven Correctional Facility, Stormville, New York, and

(3) LEON J. VINCENT, Superintendent, Green Haven Correctional Facility, Stormville, New York),

Petitioners,

against

DR. JESSE WILLIAMS II,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioner
Office and P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-7657

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

ARLENE R. SILVERMAN
Assistant Attorney General
of Counsel

TABLE OF CONTENTS

	PAGE
Citations to the Opinion Below	1
Jurisdiction	2
Question Presented	2
History of the Case	2
Reasons for Granting the Writ	4
Conclusion	11
Appendix A, Opinion, United States District Court, Southern District of New York	12
Appendix B, Opinion, United States Court of Appeals for the Second Circuit	16

TABLE OF CASES

Ashton v. *Cameron County District*, 298 U.S. 513 (1936)	6
Benton v. *Maryland*, 395 U.S. 784 (1969)	6
Chicot County Drainage District v. *Baxter State Bank*, 308 U.S. 371 (1940)	6, 7
Cook v. *Hart*, 146 U.S. 183 (1892)	14
Darr v. *Burford*, 339 U.S. 200 (1950)	9
Desist v. *United States*, 394 U.S. 244 (1968)	10, 14
Doe v. *Bolton*, 410 U.S. 179 (1973)	18, 19
Ex Parte Siebold, 100 U.S. 371 (1879)	8, 19
Fay v. *Noia*, 372 U.S. 391 (1963)	14
Grosso v. *United States*, 390 U.S. 62	8
Linkletter v. *Walker*, 381 U.S. 618 (1965)	5, 6, 7

PAGE

Marchetti v. *United States*, 390 U.S. 39 8

Miranda v. *Arizona*, 384 U.S. 436 (1966) 10

Norton v. *Shelby County*, 118 U.S. 425 (1886) 20

People v. *Williams*, 33 App. Div. 2d 534 (1969) 14

Roberts v. *LaVallee*, 389 U.S. 40 (1967) 14

Robinson v. *Neil*, 409 U.S. 505 (1973) 6, 7, 14, 19

Roe v. *Wade*, 410 U.S. 113 (1973) 4, 5, 7, 9, 10, 13, 14, 16, 18, 19

State v. *Engle*, 308 A.2d 223 (Court of Special Appeals of Maryland 1973) 19

Stovall v. *Denno*, 388 U.S. 293, 297 (1967) 9

U.S. v. *U.S. Coin and Currency*, 401 U.S. 715 (1971) 8, 20

United States ex rel. Williams v. *Zelker*, 455 F.2d 451 (2d Cir. 1971) 14, 18

United States ex rel. Williams v. *Follette*, 313 F. Supp. 269 (S.D.N.Y. 1970) 17, 18

United States ex rel. Williams v. *Preiser*, 360 F. Supp. 662 (S.D.N.Y. 1973) 18

Vuitch v. *Hardy*, 473 F.2d 1370 (4 Cir. 1973) 19

Waller v. *Florida*, 397 U.S. 387 (1970) 6, 7

STATUTES

28 U.S.C. § 1254 (1) 2

28 U.S.C. §§ 4411, 4412, 4901 8

In the

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-

PETER PREISER, Commissioner of the Department of Correctional Services of the State of New York, and PAUL J. REGAN, Chairman of the Board of Parole of the State of New York (as successor, in the imposition of restraint upon the liberty of Petitioner, of

(1) H. W. FOLLETTE, Warden, Green Haven Prison, Stormville, New York,

(2) JOHN L. ZELKER, Superintendent, Green Haven Correctional Facility, Stormville, New York, and

(3) LEON J. VINCENT, Superintendent, Green Haven Correctional Facility, Stormville, New York),

Petitioners,

against

DR. JESSE WILLIAMS II,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on May 9, 1974.

Citations to the Opinion Below

The District Court opinion is reported at 360 F. Supp. 667 (SDNY 1973). It is reproduced as Appendix "A" to this petition. The opinion of the Court of Appeals is as yet unreported. It is reproduced as Appendix "B" to this petition.

Jurisdiction

The judgment of the Court of Appeals was entered on May 9, 1974. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Question Presented

Was petitioner's abortion homicide conviction properly vacated by the District Court in a habeas corpus proceeding, where at the time of petitioner's conviction in 1966, the abortion statutes were not open to serious constitutional attack and the State of New York properly relied on their continuing validity, foregoing petitioner's prosecution on an alternative criminal theory?

History of the Case

Appellant was convicted in the Supreme Court, New York County, after trial by jury, of the crime of manslaughter in the first degree. The evidence proved that Sara Carr, unmarried and pregnant (pp. 183-84, 404)*, turned for help to the father of her unborn child and her best friend. The former sent her $500 (209). The latter, through a chain of people, provided her with the name and address of an abortionist—Dr. Jesse Williams (125-27, 164-66, 176-80).

Sara Carr went to Dr. Williams' office, and he performed an abortion on her by scraping her uterus with an instrument (326-30). However, in the course of this operation, Sara Carr went into shock. She died minutes to several hours after the scraping. At no time was an ambulance or a hospital called and Sara Carr was allowed to die of cardiovascular collapse (333-34). It was not until 12 hours after Sara Carr's death that Williams reported it to the medical examiner of the City of New York.

On December 6, 1966, appellant was sentenced to imprisonment for a term of from 5 to 10 years. He appealed the judgment of conviction to the Appellate Division, First Department, raising the claim for the first time, *inter alia*, that former New York Penal Law § 1050* was unconstitutional on the grounds that it invaded the constitutional guarantee of the right to privacy of married couples and their right to control the size of their families, tended to impose religious beliefs by the government, interfered with the rights of a duly licensed physician to practice medicine in the best interests of his patients, denied equal protection of the law to women, and buttressed an outmoded nineteenth century morality no longer applicable or needed by modern society. The judgment of conviction was affirmed on September 23, 1969. Leave to appeal to the New York Court of Appeals was denied on October 9, 1969.

By petition dated September 5, 1968, appellant sought a writ of habeas corpus in the United States District Court for the Southern District of New York alleging innumerable defects in his judgment of conviction, including the claim that § 1050 of the former New York Penal Law was unconstitutional. The District Court denied relief insofar as the unconstitutionality of § 1050 of the former Penal Law was urged so that the New York Courts might have an opportunity to reconsider petitioner's claims in the light of the then newly amended New York Abortion Law. New York Laws of 1970, C. 127.

On July 2, 1971, the Second Circuit held that petitioner had exhausted his state remedies and remanded the case to the District Court for further proceedings.

---

* A person who provides, supplies or administers to a woman, whether pregnant or not, or who prescribes for, or advises or procures a woman to take any medicine, drug, or substance, or who uses or employs, or causes to be employed, any instrument or other means, with intent thereby to procure the miscarriage of a woman, unless the same is necessary to preserve her life, in case the death of the woman, or any quick child of which she is pregnant, is thereby produced, is guilty of manslaughter, in the first degree.

In accordance with this mandate, petitioner's application again came on before the District Court, and on June 20, 1973, Judge Stewart granted petitioner's application.

The District Court held that *Roe* v. *Wade*, 410 U.S. 113 (1973), established that a penal statute such as Section 1050 of former New York Penal Law was violative of the Fourteenth Amendment. Acknowledging that the Supreme Court did not rule on the retrospective effect of *Roe*, Judge Stewart concluded that *Roe* involved a judicial decision as to a substantive freedom and as such, should be afforded retrospective effect. The District Court went on to declare petitioner's 1966 conviction for manslaughter, "null, void and of no effect." On May 9, 1974, the United States Court of Appeals for the Second Circuit affirmed this order of the District Court.

Reasons for Granting the Writ

This application raises the important question of whether a change in the view of this Court as to the substantive validity of abortion state statutes is applicable to a conviction had years ago simply because of the continuing availability of federal habeas corpus.

In *Roe* v. *Wade*, 410 U.S. 113 (1973), this Court issued a landmark and revolutionary decision delineating the scope of the right of privacy as applied to a woman's right to have an abortion and a physician's right to abort her. In an exhaustive opinion that reviewed and thoroughly examined the history of the abortion laws and their relation to evolving scientific knowledge, this Court concluded that the current state of medical knowledge no longer justified the complete outlawing of abortion. During the first trimester of pregnancy, the State could legislate only so far as to require that a physician perform an abortion, that during the second trimester, the state could further regulate the abortion procedure itself, and that in the third

trimester, the State could completely proscribe abortion except when necessary to preserve the life of the mother. *Roe* v. *Wade, supra,* 164-165.

This Court in *Wade* did not address itself, either directly or by implication, to the retroactive effect of its holding, if any, on an abortion-homicide conviction final and no longer pending on the date of the Court's decision, leaving that issue for future case law development. This petition squarely poses that issue.

Petitioner, in the Court below, argued that Sara Carr, the deceased, was aborted during her first trimester of pregnancy, that under *Wade*, he, a licensed physician, was entitled to abort her, and that since *Wade* delineated a substantive right, he was entitled to its retrospective application. Both the District and Circuit Courts observed that *Wade* was a judicial decision as to a substantive right and held that as such, it must be accorded retroactive effect. However, in so doing, both Courts failed to consider that a girl had died as a result of an illegal operation, that seven years had passed since the illegal act, and that any further prosecution might be practically as well as statutorily barred. The District and Circuit Courts ignored prior State reliance on an abortion-homicide law which was undeniably an operative fact, not seriously open to constitutional challenge in 1966, and misapplied the holding of this Court in *Linkletter* v. *Walker,* 381 U.S. 618 (1965), and its progeny.

In *Linkletter*, this Court recognized that the retroactive operation of an overruling decision is neither mandated nor prohibited by the Constitution. *Linkletter* v. *Walker, supra,* 629. Rather, the extent of the retroactive effect, if any, of the overruling decision must be determined, *inter alia,* after an analysis of the purpose of the new rule and its effect in the light of prior justifiable reliance by the parties. *Linkletter* v. *Walker, supra,* 636-637.

This Court in *Linkletter* was echoing its earlier holding in *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371 (1940). *Linkletter* v. *Walker*, *supra*, 627, 636. In *Chicot County*, this Court was presented with the retroactive effect of *Ashton* v. *Cameron County District*, 298 U.S. 513 (1936), which had declared unconstitutional a federal act which provided for municipal debt readjustments in a suit instituted by former bondholders of a municipality which had made a debt readjustment prior to a declaration of the act's invalidity. This Court observed that the courts below, in invalidating the readjustment, had proceeded on a theory that an Act of Congress found to be unconstitutional was not a law, that it was inoperative and that it imposed no rights or duties. This Court, at 374, in reversing, rejected this reasoning, stating:

> "The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects,—with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature of both of the statute and of its previous application, demand examination."

Following the reasoning of *Chicot County*, this Court, in *Robinson* v. *Neil*, 409 U.S. 505 (1973), which concerned the retroactivity of *Waller* v. *Florida*, 397 U.S. 387 (1970), discussed prior state reliance on the dual sovereignty doctrine. In *Waller*, this Court had held that the constitutional guarantee against double jeopardy previously made applicable to the states by *Benton* v. *Maryland*, 395 U.S. 784 (1969), precluded the recognition of the dual sover-

eignty doctrine with respect to separate state criminal prosecutions arising out of the same act. Cognizant of both *Chicot County* and *Linkletter*, in analyzing the considerations that must be applied before a retroactive application of the new holding, this Court, at page 509, was careful to observe:

> "The element of reliance embodied in the *Linkletter* analysis will not be wholly absent in the case of constitutional decisions not related to trial procedure . . .".

Moreover, in giving retroactive application to *Waller*, the Court was aware that such a holding could "result in a form of prejudice to the State, because in reliance upon the 'dual sovereignty' analogy the municipal prosecution may have occurred first and the sentence already have been served prior to the commencement of the state prosecution. If the offense involved was a serious one under the state law . . . , the defendant may have been unintentionally accorded a relatively painless form of immunity from the state prosecution." *Robinson* v. *Neil, supra*, 510.

Significantly, the court explained that its decision in *Waller* was not a marked "departure from past decisions of the Court, . . . [T]he justifiability of the State's reliance on lower court decisions supporting the dual sovereignty analogy was a good deal more *dubious* than the justification for reliance which has been given weight in our *Linkletter* line of cases" (Emphasis supplied). The Court then went on to deliberately leave open the weight to be accorded to reliance by the State "which was justifiable under the *Linkletter* test in determining retroactivity of a non-procedural constitutional decision . . ." *Robinson* v. *Neil*, *supra*, 510-511.

It is thus clear that the mere fact that this Court defined a new substantive right in *Roe* v. *Wade, supra*, did not end the Circuit Court's inquiry with respect to the validity of petitioner's conviction for manslaughter in the first

degree in 1966 pursuant to former Penal Law § 1050. At the time of petitioner's crime, the abortion laws were in effect. Indeed, in 1966, they were not even open to serious challenge. Yet, petitioner took it upon himself to act contrary to their express provisions notwithstanding that he feared prosecution under them. As a consequence, a girl died. Almost seven years have passed since petitioner's conviction, and aside from the practical problems involved in retrying petitioner on a new theory, such a prosecution would undoubtedly be statutorily barred. New York Criminal Procedure Law § 30.10.

The Circuit Court in an attempt to bypass this serious hurdle, relied on language in *Ex Parte Siebold,* 100 U. S. 371 (1879), to the effect that an unconstitutional law can impose no rights or duties. However, insofar as *Siebold* suggests that an unconstitutional statute is void and of no effect, such language was mere *dicta* as this Court in *Siebold* went on to uphold the validity of a federal law making it a crime for election officials to engage in deceitful and unlawful election practices as defined by State law.

Similarly, *U.S.* v. *U.S. Coin and Currency,* 401 U.S. 715 (1971), also relied on by the Circuit Court, is no authority for that Court's holding. As was pointed out by Justice Harlan in a footnote to the majority opinion, the forfeitures that the government sought to impose in that case for failure of certain individuals to register as gamblers and to pay the gambling tax required by 28 U.S.C. §§ 4411, 4412 and 4901 were still in the Appellate processes when this Court decided *Marchetti* v. *United States,* 390 U.S. 39, and *Grosso* v. *United States,* 390 U.S. 62, which held that gamblers had a Fifth Amendment right to remain silent despite the statutory requirement. Additionally, this Court in rejecting the government's argument for nonretroactivity of the *Marchetti* and *Grosso* holdings because of justifiable reliance observed that such

reliance was inconsequential since the government might only be required to undergo the relatively insignificant inconvenience of some future lawsuits where a gambler might attempt to reclaim property previously forfeited. Here, however, if the *Roe* rule is retroactively applied to petitioner, a murder conviction would be declared null and void notwithstanding a young woman's death.

Moreover, neither of these cases relied on by the Circuit Court are similar to this case at bar. Both involved prosecutions under statutes which defined criminal conduct, which conduct, without the statutes under attack, could not otherwise have been constitutionally punished. But it is uncontested here that if petitioner were in fact responsible for Sara Carr's death, he could constitutionally be prosecuted. Petitioner's sole claim is that he could not be prosecuted under former New York Penal Law § 1050.

The Circuit Court, in affirming the order of the District Court has held, in effect, that each individual can determine for himself when laws cease having validity. Moreover, it has held petitioner free from wrongdoing when he might have very well been responsible for Sara Carr's death. Petitioner has never alleged any compelling reason why he had to disobey the clear command of a then presumptively valid law and he should bear the brunt of his decision to do so. *Darr* v. *Burford*, 339 U.S. 200 (1950).

To be sure, other physicians will have the benefit of a rule which permits them to abort while petitioner did not. But as was observed in *Stovall* v. *Denno*, 388 U.S. 293, 297 (1967):

> "We recognize that Wade and Gilbert are * * * the only victims of pre-trial confrontations in the absence of their counsel to have the benefit of the rules established in their cases. That they must be given that benefit is, however, an unavoidable consequence of the necessity that constitutional adjudications not stand as

> mere dictum * * * Inequity arguably results from according the benefit of a new rule to the parties in the case in which it is announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue * * * But we regard the fact that the parties involved are chance beneficiaries as an insignificant cost for adherence to sound principles of decision-making". (388 U.S. at 301.)

Again, a similar claim of inequity was rejected in *Desist* v. *United States,* 394 U.S. 244 (1969) wherein this Court denied retroactive effect of its new rulings on wiretapping. And, as a further example, petitioner is in no worse position than the numerous petitioners for certiorari who were denied the benefits of *Miranda* v. *Arizona,* 384 U.S. 436 (1966), under circumstances recently described by Mr. Justice Douglas in his dissent in the *Desist* case:

> "* * * as I recall, some 80 cases were presented raising the same question. We took four of them, and held the rest, and then reversed each of the four, applying the new procedural rule retroactively. But as respects the rest of the pending cases, we denied any relief. *Johnson* v. *New Jersey,* 384 U.S. 719. Yet it was sheer coincidence that those precise four were chosen. Any other single case in the group or any other four would have been sufficient for our purposes". —— U.S. ——, 4 Cr. L. 3167 at 3175.

Petitioner was convicted under a manslaughter statute constitutional in 1966. He flaunted a presumptively valid law, and as a consequence, a girl died. He is not entitled to a retrospective application years later of *Roe* v. *Wade, supra,* because of the expansiveness of habeas corpus. It is apparent that the subject of this application is of widespread effect and should receive the plenary consideration of this Court.

CONCLUSION

For the foregoing reasons the instant petition for a writ of certiorari should be granted.

Dated: New York, New York, August 1, 1974.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioner

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

ARLENE R. SILVERMAN
Assistant Attorney General
of Counsel

Appendix A, Opinion, United States District Court, Southern District of New York.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No. 69 Civ. 5543

UNITED STATES ex rel. DR. JESSE WILLIAMS II,

Petitioner-Relator,

against

PETER PREISER, Commissioner of the Department of Correctional Facility, Stormville, New York, and PAUL J. REGAN, Chairman of the Board of Parole of the State of New York

(as successors, in the imposition of restraint upon the liberty of Petitioner, of

(1) H. W. FOLLETTE, Warden, Green Haven Prison, Stormville, New York,

(2) JOHN L. ZELKER, Superintendent, Green Haven Correctional Famility, Stormville, New York, and

(3) LEON J. VINCENT, Superintendent, Green Haven Correctional Facility, Stormville, New York),

Respondents.

MEMORANDUM

STEWART, DISTRICT JUDGE:

Petitioner was convicted in 1966 of violating the abortion-manslaughter section of former New York Penal Law § 1050 after an abortion performed upon Sara Carr at her request and within the first trimester of her pregnancy caused her death.

Appendix A, Opinion, United States District Court, Southern District of New York.

Petitioner was sentenced to a term of "not less than 5 nor more than 10 years" to be served in State's prison, and his license to practice medicine was revoked.

In 1969 petitioner sought a federal writ of habeas corpus claiming that the statute under which he was incarcerated was unconstitutional. The District Court dismissed petitioner's application to provide the New York courts an opportunity to reconsider his claim in view of rapidly changing public policy. On July 2, 1971, the United States Court of Appeals for the Second Circuit held that petitioner had exhausted his state remedies and remanded the case to the District Court for further proceedings.

Petitioner is presently on conditional release having already served seven years in prison. Both parties agree that if petitioner were being prosecuted today for a violation of section 1050 of former New York Penal Law, the indictment would be quashed on the ground that the statute, as applied to petitioner, was unconstitutional, according to the intervening decision on January 22, 1973 of the Supreme Court of the United States in *Roe* v. *Wade*, 410 U.S. 113 (1973). The primary issue before this Court is whether *Roe* v. *Wade* should be retrospectively applied to establish the unconstitutionality of the New York abortion-manslaughter statute as of the date of Sara Carr's abortion in 1965 and as of the date of petitioner's second trial in 1966.

On this question this Court finds for petitioner as a matter of law.

In *Roe* v. *Wade*, the Supreme Court established that a statute such as section 1050 of former New York Penal Law is violative of the Due Process clause of the fourteenth amendment. The Supreme Court did not expressly rule on the retrospectivity of its abortion decisions, but recent pronouncements by the Court as to this aspect of its constitutional adjudications of criminal cases strongly

support the notion that a judicial decision as to a substantive freedom should be afforded retrospective effect. *Robinson* v. *Neil*, 409 U.S. 505, 511 (1973); *Desist* v. *United States*, 394 U.S. 244, 249-50 (1968).

The state has at the last minute raised the argument that petitioner be required to re-exhaust his state remedies in light of *Roe* v. *Wade*.

Exhaustion of state remedies has long been a strict requirement in habeas corpus proceedings, and the so-called exhaustion doctrine was defined by the Supreme Court a decade ago: the Federal courts ought not to discharge one restrained of his liberty in violation of the Federal Constitution or laws unless the State courts have been appealed to in the first instance. *Fay* v. *Noia*, 372 U.S. 391, 418-19 (1963), quoting *Cook* v. *Hart*, 146 U.S. 183, 194-195 (1892). See *Stanton, Primary Requirements for the Application of the Federal Writ of Habeas Corpus and its Problem Areas*, 3 St. Mary's L. Jo. 215, 220-21 (1971).

At the time petitioner filed his application for a federal writ of habeas corpus, he had done everything he could do to get the state courts to overturn his abortion-manslaughter conviction. He raised the constitutional issue before the Appellate Division, *People* v. *Williams*, 33 App. Div. 2d 534 (1969), and was denied leave to appeal to the State Court of Appeals. The United States Court of Appeals has since ruled that a change in the law in some states and a change in public policy generally should not require this petitioner to re-exhaust state remedies. *United States ex rel. Williams* v. *Zelker*, 455 F. 2d 451 (2d Cir. 1971). To hold that an intervening decision which supports the position advanced by petitioner for the past seven years should now require petitioner to go back to the state courts would be to carry the exhaustion doctrine to an unreasonable extreme. See *Robinson* v. *Neil*, *supra*; *Roberts* v. *LaVallee*, 389 U.S. 40 (1967).

Appendix A, Opinion, United States District Court, Southern District of New York.

Petitioner's conviction and sentence for violating section 1050 of former New York Penal Law are hereby declared to be null, void, and of no effect, and

IT IS HEREBY ORDERED that petitioner's application for a Federal writ of habeas corpus be and hereby is granted, and

IT IS FURTHER ORDERED that the New York State Department of Correctional Services forthwith release petitioner from custody and all restraint upon his liberty upon receipt of a certified copy of this order, and

IT IS FURTHER ORDERED that the costs of this proceeding shall be allowed to petitioner against respondents herein.

IT IS SO ORDERED.

CHARLES E. STEWART,
United States District Judge.

Dated: New York, N. Y., June 20, 1973.

Appendix B, Opinion, United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 356—September Term, 1973.

(Argued March 29, 1974 Decided May 9, 1974.)

Docket No. 73-1935

UNITED STATES ex rel. DR. JESSE WILLIAMS, II,

Petitioner-Appellee,

v.

PETER PREISER, Commissioner of the Department of Correctional Services of the State of New York, et al.,

Respondents-Appellants.

Before:

KAUFMAN, *Chief Judge,*
SMITH and ANDERSON, *Circuit Judges.*

Appeal by the State of New York from an order, based on the retroative effect of *Roe* v. *Wade,* 410 U.S. 113 (1973), granting habeas corpus in the United States District Court, Southern District of New York, Stewart, *Judge.* Affirmed.

ARLENE R. SILVERMAN, Assistant Attorney General, State of New York (Louis J. Lefkowitz, Attorney General, State of New York,

and Samuel A. Hirshowitz, First Ass't Attorney General, State of New York on the brief), *for Appellant.*

CYRIL C. MEANS, JR., Esq., New York, N. Y., *for Appellee.*

ANDERSON, *Circuit Judge:*

On October 24, 1966, Dr. Jesse Williams, II, a licensed physician, was convicted by a jury for manslaughter in the first degree under former New York Penal Law § 1050[1] for the death of Miss Sara Carr following an abortion he performed upon her at his office. He was sentenced to 5 to 10 years imprisonment, and was released on parole in 1972.

At the time of the abortion, July 23, 1965, Miss Carr was in her second month of pregnancy. Death resulted from a series of seizures, the cause of which remains unknown. The medical examiner testified that the operation was perfectly performed, and although Dr. Williams did not call an ambulance and report Miss Carr's death until hours after it occurred, the State has not shown that negligence in this respect prevented the patient from being resuscitated. *United States ex rel. Williams* v. *Follette,* 313 F. Supp. 269, 272 (S.D.N.Y. 1970).

---

[1] Section 1050, which was superseded in 1967 by § 125.20(3) of the New York Penal Law, derived from the 1881 Penal Code § 192 and stated:

"A person who provides, supplies, or administers to a woman, whether pregnant or not, or who prescribes for or advises or procures a woman to take any medicine, drug, or substance, or who uses or employs, or causes to be used or employed, any instrument or other means, with intent thereby to procure the miscarriage of a woman, unless the same is necessary to preserve her life, in case the death of the woman, or of any quick child of which she is pregnant, is thereby produced, is guilty of manslaughter in the first degree."

Appendix B, Opinion, United States Court of Appeals for the Second Circuit.

Dr. Williams appealed his conviction, claiming that § 1050 violated the privacy protections of the Constitution, but the conviction was affirmed without opinion, 33 App. Div.2d 534 (Case I) (1st Dept. 1969), and leave to seek review by the Court of Appeals was denied.

He then petitioned for a writ of habeas corpus, but the district court (Pollack, *Judge*), denied relief and instructed him to give the State an opportunity to reconsider in light of New York's liberalized abortion procedure, McKinney's Session Laws of New York, 193rd Session—1970, ch. 127,[2] and court decisions indicating that abortions were matters of constitutional right. *United States ex rel. Williams* v. *Follette, supra,* at 272, 274. On appeal of that ruling this court held exhaustion did not require State reconsideration and remanded for a decision on the merits. *United States ex rel. Williams* v. *Zelker,* 445 F.2d 451, 454 (2 Cir. 1971). The petitioner agreed to a stay pending the Supreme Court's decisions in *Roe* v. *Wade,* 410 U.S. 113 (1973) and *Doe* v. *Bolton,* 410 U.S. 179 (1973). Subsequently the district court (Stewart, *Judge*) held *Roe* v. *Wade* should be retroactively applied and granted the writ. *United States ex rel. Williams* v. *Preiser,* 360 F. Supp. 667, 668 (S.D.N.Y. 1973). The State now appeals.

The State concedes that if the due process right to privacy or intimacy recognized in *Roe* is to be given retroactive effect, Dr. Williams' conviction is void. Texas State Penal Code Article 1194, found unconstitutional in *Roe,* was identical in purpose and effect to § 1050. See 410 U.S. 117-118, n. 1. Miss Carr's abortion occurred during her

---

[2] This amendment, embodied in § 125.05(3)(b) of the Penal Law (McKinney's 1973-74 Supp.), defines the performance of a consensual abortion by a "duly licensed physician . . . within twenty-four weeks from the commencement of . . . pregnancy" as a "justifiable abortional act."

first trimester, when "the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated." At 163. And this abortion was performed by "a physician currently licensed by the State." At 165. See *Doe* v. *Bolton*, 410 U.S. 195, 199.

In *Vuitch* v. *Hardy*, 473 F.2d 1370 (4 Cir. 1973), the Fourth Circuit affirmed per curiam the grant of habeas corpus because of the retroactive effect of *Roe*, and the Supreme Court denied certiorari. 414 U.S. 824 (1973). Post-conviction relief was also granted a doctor on the basis of *Roe* in *State* v. *Engle*, 308 A.2d 223 (Court of Special Appeals of Maryland 1973).

New York stresses that *Roe* was a surprise holding and that retroactive application would disregard the justifiable reliance in 1966 that § 1050 always would be good law.[3] But a presumption of constitutionality is present in all state prosecutions, *Robinson* v. *Neil*, 409 U.S. 505, 509 (1973), and is never enough by itself to bar habeas corpus for one restrained under the authority of a statute subsequently declared unconstitutional. *Ex Parte Siebold*, 100 U.S. 371 (1879).

---

[3] The State contends that, because the doctor delayed in reporting Miss Carr's death after the abortion, it might have been able to prosecute Williams for criminal negligence, see New York Penal Law § 125.10, but that it chose to rely on the abortion statute instead. The statute of limitation has tolled on any criminal negligence prosecution, and New York claims that it has been, therefore, damaged by justifiable reliance. This reliance interest, however, is not as substantial as it first appears because Williams had raised his constitutional challenge, and other authorities had begun to question the constitutionality of abortion prosecutions before the statute of limitations had tolled. New York had the opportunity to try to prove criminal negligence, but chose not to pursue it.

Roe recognized a substantive right to privacy and forbids the State from regulating abortions such as the one Dr. Williams performed. The Supreme Court has stated, "No circumstances call more for the invocation of a rule of complete retroactivity." *United States* v. *United States Coin and Currency*, 401 U.S. 715, 724 (1971). See Prospective Overruling and Retroactive Application in the Federal Courts, 71 Yale L. J. 907 (1962).[4]

If licensed physicians have a constitutional right to perform non-negligent, consensual abortions without fear of prosecution, Dr. Williams cannot remain deprived of liberty for having done so. Section 1050 is, "in legal contemplation, as inoperative as though it had never been passed." *Norton* v. *Shelby County*, 118 U.S. 425, 442 (1886). This declaration of retroactive invalidity assures

---

[4] In civil cases, prospective overruling has been invoked when private or public parties have justifiably relied to their potential detriment on prior decisions upholding the validity of an unconstitutional statute. *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371 (1940); *Great Northern Railway Co.* v. *Sunburst Oil & Refinery Co.*, 287 U.S. 358 (1932); *Kuhn* v. *Fairmont Coal Co.*, 215 U.S. 349, 370 (1910) (Holmes, *J.*, dissenting); *Gelpke* v. *City of Dubuque*, 1 Wall 175 (1863). In criminal cases, prospective rulings have protected private parties who justifiably relied on the invalidity of a criminal statute. *James* v. *United States*, 366 U.S. 213 (1961). State reliance has also been protected by prospective rulings in criminal cases where new procedural rights have been incorporated, and the reliability of convictions attained prior to incorporation was not in question. *Desist* v. *United States*, 394 U.S. 244 (1969); *Stovall* v. *Denno*, 388 U.S. 293 (1967); *Linkletter* v. *Walker*, 381 U.S. 618 (1965). See Mishkin, The High Court, The Great Writ, and the Due Process of Time and Law, 79 Harv. L. Rev. 56 (1965). But prospectivity remains "an exception to the general rule of retroactivity," and, when a new right is recognized that is intended "to prevent a trial from taking place at all," reliance in criminal cases is irrelevant, and retroactivity is presumed. *Robinson* v. *Neil*, 409 U.S. 505, 507-508, 509 (1973).

the supremacy of the newly recognized substantive right over a state's power to punish.[5] See Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1 (1959).

The granting of the writ is affirmed.

---

[5] A court can easily determine, as was done below, whether the abortion, at the time and in the manner performed, is protected under the *Roe* and *Doe* standards, and no new trial is needed after such a determination.